1986

Salt Lake City School District v. Galbraith & Green : Brief of Respondent

Utah Supreme Court

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DOCKET NO. 860090-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY SCHOOL DISTRICT, Plaintiff-Respondent, vs. GALBRAITH & GREEN, INC., Defendant-Appellant.	:	860090-CA Case No. 20405

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable J. Dennis Frederick, District Judge

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Plaintiff-Respondent,	:	
	:	Case No. 20405
vs.	:	
GALBRAITH & GREEN, INC.,	:	
Defendant-Appellant.	:	

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The major issues presented on appeal are as follows: Does the evidence support the trial court's finding that Galbraith & Green, Inc., hereinafter Galbraith & Green, breached its duty as consultant to Salt Lake City School District, hereinafter the school district, for the district's self-funded insurance plan? Have the elements of equitable indemnity been satisfied?

DETERMINATIVE STATUTE

> 31-20-11. Conversion rights on termination of group health insurance coverage. (1) Any insurer, health maintenance organization, health service corporation, mutual benefit association, or other entity, licensed to offer benefits of health and accident insurance on a group basis or equivalent coverage on a group basis under this title or section 49-9-14; except, group policies which provide catastrophic, aggregate stop loss, or benefits for specific diseases or for accidental injuries only shall provide that a person whose insurance under the group policy has been terminated for any reason, other than those specified in subsection (2), and who has been continuously insured under the group policy, or its predecessor, for at least six months immediately prior to termination, is entitled to a converted policy of health insurance from the insurer as provided in this chapter. The duty imposed by this section to offer a conversion policy is not applicable to a dental service corporation.
>
> (2) An employee or member is not entitled to have a converted policy issued if termination under the group policy occurred because:
>
> (a) Of failure to pay any required contribution; or
>
> (b) The group coverage was discontinued and replaced with other group coverage within 31 days.
>
> (3) A person entitled to pregnancy benefits under a group policy who becomes pregnant while that policy is in effect and who is entitled to a converted policy is entitled to pregnancy benefits under the converted policy.

STATEMENT OF THE CASE

Nature of the Case

This is an action by the Salt Lake City School District for indemnification from Galbraith & Green, which was retained by the school district to provide consulting services on its self-funded insurance plan, for a settlement paid by the school district to a former employee. The school district's claim is based on Galbraith & Green's failure to advise the school district of its obligation to comply with Section 31-20-11 of the Utah Code Annotated and offer a converted health insurance policy to employees whose group health insurance coverage is terminated. The school district's claim is also based on Galbraith & Green's ambiguous drafting of the section entitled "Termination of Coverage" in an employee benefit booklet, outlining benefits available under the school district's insurance plan and distributed to school district employees. Because of this breach by Galbraith & Green of its professional consulting responsibility, the school district became liable to Mr. and Mrs. Wade Welch who sought coverage of medical expenses incurred after Mr. Welch's termination of employment with the school district. The Welch's claim was in the amount of $6,028.62. The school district settled the claim for $5,000 and sought indemnification from Galbraith & Green.

Course of the Proceedings

This matter was tried before the Honorable J. Dennis Frederick without a jury on October 11, 1984.

Disposition

Judge Frederick awarded judgment in favor of the school district in the amount of $5,000 plus $2,623.50 in attorneys fees.

Statement of the Facts

The relationship between the Salt Lake City School District, and Galbraith & Green, Inc., began in the early 1970's. The school district hired Galbraith & Green for consultation on its self-funded insurance plan. Later, administration of the plan was added to Galbraith & Green's responsibilities. This plan was a benefit offered by the school district to its employees. (Transcript Volume I, pages 4, 34)

In September of 1972, Don Merrill, assistant vice president at Galbraith & Green and the account executive responsible for the school district's account, sent a proposal to Burton Miller, the school district person responsible at that time for the insurance program, outlining the consulting services provided by Galbraith & Green to the school district. (Exhibit 1, Tr. Vol. I, p. 63) Don Merrill's proposal indicated that "these same services are available as required in the future without the initial high consulting cost." (Ex. 1, p. 2) The proposal set out by Don Merrill was accepted by the school district board (Tr. Vol. I, pp. 70-71). Thereafter, the school district submitted a purchase order to Galbraith & Green for consulting and administrative services (Ex. 2, Tr. Vol. I, pp. 45, 46) and was billed monthly by Galbraith & Green for consulting and administration services. (Ex. 2, pp. 2, 3, Ex. 3, Tr. Vol 1, pp. 11, 45)

A letter sent by Don Merrill to W. Gary Harmer of the school district in July, 1973, enclosed a copy of an administrative contract and specifically stated that this contract did not include the consulting services already being provided by Galbraith & Green to the school district. Accordingly, it stated that an additional premium for consulting services of 1.49% of the monthly computed premium would be added to the 2.27% of the monthly computed premium cost for adminsitrative services. Subsequent statements from Galbraith & Green to the school district indicated a premium computed with a percentage of 3.76%, the sum of percentages for consulting services (1.49%) and administrative services (2.27%). (Exs. 2, 21, Tr. Vol. II, pp. 20, 21)

This arrangement, whereby Galbraith & Green provided the school district with consulting and administrative services for its self-funded insurance plan, continued in effect through the time that this lawsuit was instituted. (Ex. 3)

Pursuant to their agreement to provide consulting services, Galbraith & Green prepared and provided booklets to be distributed by the school district to district employees. These booklets outlined the benefits available under the school district's self-funded insurance plan. (Ex. 1, p. 3, Exs. 5, 10, 11, 14, 15, Tr. Vol. I, pp. 11, 13-15, 26-27, 65-66) The booklet prepared for 1972, in fact, designated Galbraith & Green as consultants. (Ex. 10) The employee benefit booklets prepared by Galbraith & Green were periodically revised by it to reflect changes in the school district's plan. (Ex. 5, Tr. Vol. I, pp. 27 and 65-66)

In addition, Galbraith & Green was retained and agreed to advise the school district of changes in the law and changes in the insurance industry which affected the school district's self-funded plan. (Ex. 1, Tr. Vol. I, pp. 11, 12, 44, 66) Pursuant to its agreement, Galbraith & Green, in fact, did provide advice on changes in the law which affected the school district's plan. (Ex. 6, Tr. Vol. I, pp. 11, 12, 66) In 1979, for example, Galbraith & Green advised the school district of changes in its insurance plan necessitated by a Federal Civil Rights Amendment. (Ex. 6) The school district responded to Galbraith & Green's advice regarding changes in the law by implementing the changes in its self-funded plan. (Ex. 6, p. 1, Tr. Vol. I, pp. 12-13)

Galbraith & Green and W. Gary Harmer of the school district discussed implementation of a conversion privilege. This would have made available to a terminating employee a health insurance policy on which the employee would pay the premium. However, Galbraith & Green never advised the school district that it was required by law to offer such a conversion privilege. (Ex. 8, Tr. Vol. I, pp. 34, 37 and 38; Vol. II, pp. 8-10) Accordingly, not being advised that state law required that it offer a conversion privilege, the school district elected not to offer such a privilege. (Tr. Vol. II, pp. 8-10)

School district trades helper Wade Welch terminated his employment from the school district on November 26, 1979. (Record, p. 7, Tr. Vol. I, pp. 28-29) Mr. Welch was employed to perform services for twelve months of the year as opposed to nine months of

the year like some other categories of school district employees such as teachers. (Ex. 9, Tr. Vol. I, pp. 19, 20, 29)

During the time of Mr. Welch's employment with the school district, he and his dependents were covered by the school district's health and life insurance plan. (Record, pp. 3, 27) Mr. Welch's wife became ill during the term of her husband's employment with the school district and claims for medical expenses were submitted for coverage. (Record, pp. 3, 27) The Welchs' medical expenses incurred prior to November 26, 1979, the date of Mr. Welch's termination of employment with the school district, were paid by the plan.

After Mr. Welch's November 26, 1979 termination, the district, pursuant to the plan, considered Mr. Welch's participation under the plan to be over and refused payment of subsequent medical expenses. It did not advise him of any conversion privilege. (Record, pp. 3, 27) The Welchs' thereafter brought a lawsuit against the school district seeking coverage of medical expenses incurred after Mr. Welch's termination date. Their claim was in the amount of $6,128.62, plus interest. (Record, pp. 3, 5-9, 27, Tr. Vol. I, pp. 16-17, the Court took judicial notice of Welch v. The Board of Education)

The Welches' amended complaint alleged that they relied on the following language in the employee benefit booklet entitled, "Your Medical and Life Plan," prepared by Galbraith & Green:

> TERMINATION OF COVERAGE
>
> The coverage under this plan shall terminate on the earliest of the following dates:
>
> * * * *
>
> e) The end of the month in which employment terminates or the end of your contract agreement, whichever is later.

> Dependent coverage terminates when the employee coverage terminates, or when the dependent is no longer eligible as a dependent.

(Ex. 14, Tr. Vol. I, pp. 26-27, Record, p. 6) The Welches asserted in their amended complaint that they were entitled by the school district's plan to coverage for medical expenses after Mr. Welch's termination date of November 26, 1979, until June 30, 1980, the time when contract provisions were renegotiated. (Ex. 14, Record, pp. 3, 5-9, 27) The Welches also asserted in their amended complaint that the school district failed to provide them with a conversion privilege as required by Section 31-20-11, Utah Code Annotated. (Record, pp. 3, 3-9, 27) Prior to Wade Welch's termination as a school district employee, Section 31-20-11 of the Utah Code Annotated had become effective. This law requires that when an employee's group health insurance coverage is terminated, he or she be offered a converted health insurance policy by the insurer.

The school district settled the claim of the Welches for five thousand dollars. (Tr. Vol. I, pp. 17, 21)

SUMMARY OF ARGUMENTS

The evidence supports the trial court's finding that Galbraith & Green was retained by the school district to provide it with consulting and administrative services for the self-funded insurance plan it offered as a benefit to its employees. The evidence reveals a long relationship whereby Galbraith & Green advised the school district of changes in the law affecting the district's insurance

plan. Also pursuant to its function as a professional consultant to the school district for the district's self-funded insurance plan, Galbraith & Green drafted booklets, intended for distribution to school district employees, which outlined benefits available under the district's insurance plan.

The finding that Section 31-20-11 of the Utah Code Annotated requiring that terminating employees be offered a converted health insurance policy upon termination of group health insurance coverage applied to the school district is also substantiated. Although discussions concerning implementation by the school district of a conversion privilege took place between representatives of the school district and Galbraith & Green, the finding that Galbraith & Green never advised the district that it was required by law to offer such a privilege is supported by the evidence. Also substantiated is the finding that language relating to Termination of Coverage in booklets drafted by Galbraith & Green and distributed to school district employees was ambiguous in leading employees to believe insurance coverage continued after their termination of employment with the school district.

As professional consultants for the school district's self-funded insurance plan, Galbraith & Green owed a duty both to the school district and the school district employees, for whose benefit the school district's insurance plan was created. Galbraith & Green had a duty to exercise reasonable care and competence in providing consulting services for the school district's self-funded insurance plan. Failure to exercise such care would subject Galbraith & Green

to liability for the harm caused to those who relied upon, and were expected to do so, Galbraith & Green's consulting services.

Galbraith & Green should indemnify the school district for the amounts paid to settle the claim of its former employee and for reasonable attorneys fees incurred in defending that claim. The school district discharged a legal obligation to its former employee, Wade Welch. The failure of the school district to offer a conversion privilege coupled with the ambiguous language in the booklet describing insurance benefits available under the district's plan rendered the school district liable to the Welches. The school district settled the claim for less than the amount sought by the Welches.

Galbraith & Green was also liable to the Welches. Galbraith & Green's failure to exercise reasonable care and competence in drafting the employee benefit booklet rendered it liable to the employees who relied on the information contained therein. Galbraith & Green's failure to exercise reasonable care in providing consulting services for the school district's insurance plan by failing to advise the district of the requirements of Section 31-20-11 of the Utah Code Annotated also rendered Galbraith & Green liable to the employees for whose benefit the school district retained Galbraith & Green for insurance consulting services.

As between the school district and Galbraith & Green, the obligation to the Welches ought to be discharged by Galbraith & Green. Because of Galbraith & Green's breach of its duty to provide the school district with professional insurance consulting services

by failing to provide competent advice, the school district was forced to settle the claim of its former employee. The school district is entitled to indemnification by Galbraith & Green for the amount of the settlement and reasonable attorneys fee.

ARGUMENT

POINT I

THE FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE AND THE JUDGMENT SHOULD BE AFFIRMED.

In reviewing the findings and judgment of the District Court, after a trial on the merits, the evidence must be viewed by this court in the light most favorable to the prevailing party. Sharpe v. American Medical Systems, Inc., Utah, 671 P.2d 185 (1983); Sohm v. Winegar, Utah, 565 P.2d 1134 (1977); Cutler v. Bowen, Utah, 543 P.2d 1349 (1975); and Taylor v. Johnson, 15 Ut 2d 342 (1964). Where the findings are substantiated by the evidence, the judgment should be affirmed. Sharpe v. American Medical Systems, Inc., Utah, 671 P.2d 187 (1983); Charlton v. Hackett, 11 Ut. 2d 389, 360 P.2d 176 (1961); First Western Fidelity v. Gibbons & Reed Company, 27 Ut. 2d 1, 492 P. 2d 132 (1971).

The findings are substantiated by the evidence. The pertinent findings are discussed below:

> A. Salt Lake City School District retained Galbraith & Green to consult with it regarding its self-funded health plan which it provided to its employees and over a long period of time made regular payments to Galbraith & Green, Inc., for its services. Galbraith & Green, Inc., was obligated to advise the Salt Lake City School District of pertinent changes in the law affecting the District's self-funded plan and undertook to so advise the District. (Findings 3 and 4, Addendum)

The trial court found that Galbraith & Green was retained by the school district to provide consulting services for the school district's self-funded insurance plan. This finding is substantiated by the evidence. The documents in evidence in this matter and the conduct of the parties evidenced an intention by the school district to retain Galbraith & Green for consulting services regarding its insurance plan and an intention by Galbraith & Green to provide such consulting services to the school district.

The relationship between the school district and Galbraith & Green began in the early 1970's. An outline of the consulting services provided by Galbraith & Green to the school district was set out in Don Merrill's 1972 proposal to school district employee Burton Miller (Ex. 1). This proposal provided in part that

> On a continuing and month to month basis, the following services are provided:
>
> ... design and preparation of the original supply and continuing requirements of ... employee booklets ... (Ex. 1, page 3)
>
> ... coordination of legal counsel with Galbraith & Green's attorney on self-funding, (coordination of subject matter and all research material for self-funding) (Ex. 1, page 4)

The proposal was approved by the school district and a purchase order requisitioning consulting and administrative services from Galbraith & Green was issued by the school district. Galbraith & Green thereafter sent monthly statements for consulting and administrative services to the school district.

The school district did, in fact, sign an agreement whereby it retained Galbraith & Green for administrative services. This

agreement, however, was for services in addition to those already being provided by Galbraith & Green to the school district. The July 10, 1973 letter from Galbraith & Green's Don Merrill to W. Gary Harmer of the school district proposing the administrative contract clearly indicated that this contract was for services in addition to the consulting services already being provided by Galbraith & Green to the school district. (Ex. 21) Subsequent statements from Galbraith & Green to the school district confirmed that the cost for services provided by Galbraith & Green to the school district was comprised of a percentage for consulting services and a percentage for administrative services.

In addition, the conduct of Galbraith & Green evidenced an undertaking to provide consulting services. Galbraith & Green drafted booklets, intended for distribution to school district employees, outlining benefits available under the school district's insurance plan. Included in the benefit booklet prepared by Galbraith & Green and in use in 1979 (the year Mr. Welch terminated) was the following provision regarding termination of coverage:

> TERMINATION OF COVERAGE
>
> The coverage under this plan shall terminate on the earliest of the following dates:
>
> a) The date of termination of the plan, or
> b) The date any specific benefit terminates
> c) The date you become a full-time member of armed forces of any country, or
> d) The date you fail to make any required contribution, or
> e) The end of the month in which employment terminates or the end of your contract agreement, whichever is later.

> Dependent coverage terminates when the employee coverage terminates, or when the dependent is no longer eligible as a dependent.

The Welches were misled by the language of Part (e) into believing that their health insurance coverage extended beyond Mr. Welch's termination date.

In the Court's Findings of Fact 9 and 10 and its Conclusion of Law 2, (Addendum) the trial court determined that Part (e) above was so ambiguous as to create the expectation in a terminating district employee that insurance coverage would continue after the date of his termination. This determination is substantiated by reading the language of that part of the benefit booklet. School district employee Wade Welch, relying on the booklet prepared by Galbraith & Green, had exactly this expectation.

Galbraith & Green also undertook to provide the school district with legal advice as to how changes in the law would affect its self-funded plan. A May 1979 letter from Don Merrill of Galbraith & Green apprised the school district of changes in the self-funded plan regarding maternity benefits necessitated by a Federal Civil Rights Amendment. Relying on Galbraith & Green's direction, the school district made required amendments to its plan.

W. Gary Harmer of the school district states at page 44 of Volume I of the transcript, "They agreed to give us legal advice on the insurance policy itself, yes, advise us of changes in law and requirements of law, yes."

Don Merrill, formerly Galbraith & Green's account executive handling the school district account, confirms W. Gary Harmer's understanding. At Volume I, page 66, he is asked by the school district's counsel, "Periodically did you advise Gary Harmer in the Board of Education of changes that you felt should be made in the employee booklets?". Don Merrill replies, "Yes, especially those that would be meaningful either through State or Federal regulations."

> B. Prior to Wade Welch's termination as an employee of the District, Section 31-10-11 (sic) of the Utah Code Annotated became effective and most likely would have applied to Mr. Welch. (Finding 5, Addendum)

The finding that Section 31-10-11 (sic) of the Utah Code Annotated would have applied to Mr. Welch was supported by the expert testimony of Wendell Bennett, an attorney experienced in the field of insurance law. At page 58 of Volume I of the transcript, Mr. Bennett stated:

> My opinion is that in the interpretation of 31-20-11 of the Utah Code Annotated, if somebody holds themselves out to provide insurance benefits just because they haven't qualified under some licensing provision would not exempt them from it. My experience has been that every effort has been made by the legislature and by the Courts' interpretation to extend coverages and allow as broad of coverage as possible, even though the person providing it may have not filled out the appropriate forms and registered with the appropriate state agency, so I think under the intent of this where they're holding themselves out as an insurer, a self-insurer, that the provisions of 31-20-11 would be applied against them.

On page 60 of Volume I of the transcript, Mr. Bennett was questioned by counsel for Galbraith & Green, who asked, "and the

Board doesn't issue insurance, do they?". Mr. Bennett responded, "Well, they administer an insurance plan. Any way you want to cut it, it's insurance." Mr. Bennett went on to say:

> I would think, as I explained before, that the Court is going to give as broad a construction as possible to afford the intent of that and that is, that if a person terminates his employment, he can convert that plan and cover himself."

Mr. Bennett also provided expert testimony to the effect that ERISA did not preempt the application of Section 31-20-11 Utah Code Annotated to the school district's self-funded insurance plan.

> C. Galbraith & Green unreasonably failed to advise the District of the effect of Section 31-10-11 (sic). (Finding 6, Addendum)

The finding that Galbraith & Green did not advise the school district that a conversion privilege was necessitated by state law is well substantiated by the evidence. Although discussions concerning implementation by the district of a conversion privilege took place between representatives of the school district and Galbraith & Green, Galbraith & Green never advised the district that it was required by law to offer such a privilege. Not having been advised by Galbraith & Green that it was not required to offer a conversion privilege, the school district elected not to offer the privilege. Moreover, Galbraith & Green's position as late as November 3, 1981, was that the school district was not required by state law to offer such a privilege. (Ex. 8)

After agreeing to and undertaking to provide the school district with advice as to the effect of changes in the law on its insurance

plan, Galbraith & Green failed to apprise the school district of the effect of Section 31-20-11 of the Utah Code Annotated. Having made these findings, well supported by the evidence, the trial court concluded that Galbraith & Green breached its professional consulting responsibility.

Appellant does not take issue with the other findings of fact by the trial court. Respondent maintains that all of the findings of fact are substantiated by the evidence and that the trial court's judgment should be affirmed.

POINT II.

GALBRAITH & GREEN, AS A PROFESSIONAL CONSULTANT FOR THE SCHOOL DISTRICT'S SELF-FUNDED INSURANCE PLAN, OWED A DUTY BOTH TO THE SCHOOL DISTRICT AND THE SCHOOL DISTRICT EMPLOYEES.

The Trial Court's finding that Galbraith & Green was retained by the school district to provide consulting services for the school district's self-funded insurance plan is supported by the evidence and is discussed more fully in Point I, above. The evidence indicates that Galbraith & Green conducted itself as a consultant to the school district with respect to its insurance plan and that the school district relied upon Galbraith & Green's advice concerning the self-funded plan.

Pursuant to its function as a professional insurance consultant to the school district regarding the district's insurance plan, Galbraith & Green drafted booklets, intended for distribution to school district employees, which outlined benefits available under

the school district's insurance plan. These booklets which Galbraith & Green prepared were intended for the edification of school district employees. They relied on the booklets for information concerning their insurance benefits, as they were intended to.

As professional insurance consultants, Galbraith & Green owed a duty to the school district and to its employees which is well supported in Utah case law. In the case of Bushnell v. Sillitoe, 550 P.2d 1284 (Utah 1976), this Court considered a claim by property owners against an engineering firm which inaccurately surveyed a piece of property. Under the facts of that particular case, the engineer was not held liable for his inaccurate survey to third parties with whom he did not have a contract. The court looked to Section 552 of the Restatement of Torts for guidance as to whether the plaintiffs were within the class of persons for whose guidance the engineer had prepared the survey and determined that they were not.

Section 552 of the Restatement of Torts, cited with approval by this court in Bushnell, provides that:

> One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if
>
> (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
>
> (b) the harm is suffered
>
> (i) by the person or one of the class of persons for whose guidance the information was supplied, and

> (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

This section imposes upon Galbraith & Green, as professional insurance consultants to the school district, a duty to provide compentent advice. Galbraith & Green knew that the school district would rely on their advice for the district had, in fact, retained Galbraith & Green to provide such advice as to its insurance plan. Galbraith & Green, pursuant to its agreement with the school district, prepared booklets advising school district employees of benefits under the school district's insurance plan. Galbraith & Green knew or should have known that the school district employees would rely on the booklets for information concerning their insurance benefits. It was for just this purpose, communication of insurance benefit information to school district employees, that Galbraith & Green prepared the employee benefit booklets.

This Court in Milliner vs. Elmer Fox & Company, 529 P.2d 806 (Utah 1974), provided that lack of privity is not a defense for an accountant who is aware of the fact that his work will be relied upon by a party or parties who may extend credit to his client or assume his client's obligation. In that case, liability was limited to those who could reasonably be foreseen as a third party who would be expected to rely on the financial statement prepared by the accountant. Certainly the school district employees, for whom the booklets were prepared, could be foreseen as third parties expected to rely on the benefit booklets prepared by Galbraith & Green.

Support for Galbraith & Green's duty as professional consultants to the school district is further supported by the case of DCR, Inc. vs. Peak Alarm Company, 663 P.2d 433 (Utah 1983). In that case, this Court found that a negligence cause of action against a burglar alarm company existed entirely separate from the contract based claims of a company which had contracted for the installation and maintenance of a burglar alarm system and to whom the burglar alarm company had allegedly failed to disclose warnings that the alarm system could be deactivated by a simple technique well-known to criminals. The court stated that Utah, like the majority of jurisdictions, recognized a duty to exercise reasonable care on the part of one who undertakes to render services.

The Court cited §323 of the Restatement (Second) of Torts which is analagous in principle to §552 of the Restatement of Torts cited in Bushnell, supra. Section 323 provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

The reference by the Court in DCR to Prosser's statement of the rule of reasonable care is particularly apt to Galbraith & Green's duty to both the district and to its employees. Prosser states:

> It is no longer in dispute that one who renders services to another is under a duty to exercise

> reasonable care in doing so, and that he is liable for any negligence to anyone who may foreseeably be expected to be injured as a result. (W. Prosser, Handbook of the Law of Torts, Section 304 (4th Ed.), DCR vs. Peak Alarm, Supra at p. 436.)

Further support for Galbraith & Green's duty, as professional consultants, to apprise the school district of changes in the law is provided in this statement of Professor Carl S. Hawkins, cited by the court in DCR, that:

> The "duty" concept limits defendants' liability to claims arising out of particular relationships and risks. In professional negligence cases, a contract with the client most often creates the relationship from which the duty of care arises. However, the defendants' tort liability is not based upon breach of contract, but rather upon violation of the legal duty independently imposed as a result of what the defendant undertook to do with relation to the plaintiffs' interests. Thus, when a defendant has undertaken to give professional services gratuitously, liability may be imposed for injuries resulting from substandard conduct, even though there is no contract. (Vol. 1981, No. 1, BYU L. Rev. 33, 36, DCR supra, page 436)

There was a duty of Galbraith & Green, which was retained by the school district to provide consulting services for the school district's self-funded insurance plan and which undertook to provide such consulting services, to exercise reasonable care and competence in providing such services. This duty was owed both to the school district who relied upon its advice as to its self-funded insurance plan and to the district employees who relied upon the booklets drafted by Galbraith & Green for information concerning their benefits and for whose benefit the district's insurance plan was created.

POINT III

GALBRAITH & GREEN SHOULD INDEMNIFY THE SCHOOL DISTRICT FOR THE AMOUNT THE SCHOOL DISTRICT PAID TO SETTLE THE WELCHS' CLAIM AND FOR THE SCHOOL DISTRICT'S ATTORNEYS FEES IN DEFENDING THAT CLAIM.

The elements of proof required to prevail in a claim for equitable indemnity, are set out in the case of Ore-Ida Foods, Inc. v. Indian Head Cattle Company, 627 P.2d 469 (Oregon 1981):

1. Discharge of a legal obligation owed by the payor to a third person.

2. The person against whom indemnity is claimed must also be liable to the third person.

3. As between the claimant payor and the person against whom indemnity is claimed, the obligation ought to be discharged by the latter.

All three of these elements of indemnification are present in this case.

1. The school district has discharged a legal obligation owed to the Welches.

The trial court concluded that the school district became liable to Wade and Susan Welch in Civil No. C80-7911. (Conclusion No. 4, Addendum). This conclusion is supported by the evidence.

Expert testimony was presented which confirmed that the settlement made by the school district with the Welches was well taken and reasonable. Attorney Wendell Bennett, having expertise in the field of insurance law, stated that if the lawsuit between the school district and the Welches had gone to trial, it was his opinion that the school district would have been found liable for the entire amount sought by the Welches. He testified that it was

his opinion that the $5,000 settlement made by the school district was reasonable. By settling the lawsuit for $5,000, he thought the school district saved itself about $1,200.

The expert further testified that it was his opinion that Section 31-20-11 of the Utah Code Annotated applied to Welch and accordingly, he should have been offered a conversion privilege by the school district. (Transcript Volume I, pp. 58-60) The failure of the school district to offer such a privilege coupled with the ambiguous language in the booklet describing insurance benefits under the school district's self-funded plan rendered the school district liable to the Welches. Under such circumstances, the settlement made by the school district was reasonable.

Appellant argues that the school district's defense in the Welch' lawsuit was not tendered to Galbraith & Green. It further argues that Galbraith & Green was not made a party to the Welch v. Board of Education of Salt Lake City School District lawsuit and that the settlement with the Welches was made without Galbraith & Green's consent. Appellant cites no authority that either notice of or the opportunity to participate in the lawsuit with the Welches are requisites for indemnification of the school district by Galbraith & Green.

The case of Pan American Petroleum v. Maddux Well Service, Wyo., 586 P.2d 1220, involved a well owner who was a defendant in a wrongful death action involving the death of a contractor's employee and who sought indemnification from the contractor. There, the court stated:

> ...if an indemnitor declines to approve a proposed settlement or to assume the burden of

> the defense, then the indemnitee is only required to prove a potential liability to the original plaintiff in order to support a claim against the indemnitor...If there is no opportunity to either approve or defend, then the indemnitee must show actual liability to the original plaintiff...In either event, the reasonableness of the settlement amount must be shown by the indemnitee...We note that a request to defend is not a prerequisite to fix liability,...but it or a request to approve a settlement may be determinative of the indemnitee's burden of proof as to original liability. Id. at 1225, citations omitted.

The evidence supports the finding that the settlement made by the school district discharged a legal obligation of the school district to the Welches and that the settlement was reasonable.

2. Galbraith & Green was also liable to the Welches.

As discussed more fully in Point II, Galbraith & Green owed a duty to the school district employees. Section 552, Restatement of Torts, cited with approval by this court in Bushnell, supra, supports this finding, as does Professor Prosser's rule cited in DCR, supra.

Here, Galbraith & Green prepared the employee benefit booklets designed for distribution to school district employees. The booklets were intended to inform the employees of benefits available under the school district's insurance plan. As stated before, school district employees relied upon the booklet for benefit information, just as they were intended to. The booklet drafted by Galbraith & Green and relied upon by the Welches was ambiguous in that it misled them into believing that their health insurance extended beyond the date of Mr. Welch's termination of employment with the school district. Galbraith & Green also failed to inform the school district that it

was required to offer the Welches a conversion privilege upon Mr. Welch's termination of employment. Galbraith & Green, in failing to exercise reasonable care and competence in drafting the employee benefit booklets and in failing to advise the school district of the requirements of Section 31-20-11 of the Utah Code Annotated, was liable to the employees for whose guidance the booklets were prepared and for whose benefit the school district retained Galbraith & Green for insurance consulting services.

> 3. As between the school district and Galbraith & Green, against which indemnity is claimed, the obligation to the Welches ought to be discharged by Galbraith & Green.

This Court in the case of Bettilyon Construction Company v. State Road Commission, 20 Ut2d 319, 437 P.2d 444 (1968), a case in which a road contractor sought indemnification for legal expenses incurred defending a third party lawsuit, discussed the proof requirements in an indemnification action. In that case, the Court said that absent a contract provision requiring the commission to indemnify the contractor for defending third party lawsuits, the State Road Commission would have to be found guilty of some improper conduct or violation of its duty under its contract which caused the suit by the third party.

The trial court in the present case found that Galbraith & Green breached its duty, both to the school district and district employees, to provide professional insurance consulting services. The trial court found that the language in the employee benefit booklets, drafted by Galbraith & Green, was ambiguous and could have led school

district employees, such as Wade Welch, to believe that insurance coverage extended beyond the employee's date of termination. The trial court further found that Galbraith & Green unreasonably failed to advise the school district of the effect of Section 31-20-11, Utah Code Annotated on the school district's self-funded plan. Based on these findings, the trial court concluded that these actions by Galbraith & Green constituted a breach of its duties under its agreement to provide the school district with consulting services for its insurance plan. Because of Galbraith & Green's breach of its duties to provide competent advice to the school district regarding its insurance plan, the school district was obligated to settle the claim of its former employee.

Under these circumstances, the elements of indemnification have been established and Galbraith & Green, therefore, should indemnify the school district for the amount of the reasonable settlement paid by the district to Wade Welch. In addition, the school district is entitled to be indemnified for its reasonable attorneys fees incurred in defending the civil action against it by its former employee. Jones v. Strom Construction Company, Inc., 527 P.2d 1115 (Wash. 1974).

CONCLUSION

The findings of the trial court are substantiated by the evidence and should be affirmed.

RESPECTFULLY SUBMMITTED this 12 day of July, 1985.

BAYLE, HANSON, NELSON & CHIPMAN

JOHN M. CHIPMAN

ANDREA C. ALCABES
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed four copies of the foregoing **BRIEF OF RESPONDENT**, to Mr. James R. Brown, Jardine, Linebaugh, Brown & Dunn, attorneys for Appellant, at 370 East South Temple, Suite 401, Salt Lake City, Utah 84111, on this 12 day of July, 1985.

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

SALT LAKE CITY SCHOOL DISTRICT, Plaintiff,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	)	
GALBRAITH & GREEN, INC., Defendant.	)	Civil No. C82-9085 JUDGE J. DENNIS FREDERICK

This action came on for trial before the Court, Honorable J. Dennis Frederick, District Judge, presiding, on the 11th day of October, 1984, at the hour of 10:00 a.m. on plaintiff's complaint for indemnification from defendant, and both parties were present through their representatives and were represented by John M. Chipman, counsel for plaintiff, and James R. Brown, counsel for defendant, and the Court having heard the evidence, having heard the argument of counsel, having reviewed the trial memorandum submitted by counsel for plaintiff as well as the exhibits and the pleadings on file in this matter and in Civil No. C80-7911, the Court now makes its Findings of Fact and Conclusions of Law by a preponderance of the evidence:

FINDINGS OF FACT

1. The Salt Lake City School District at all relevant times lacked expertise in the area of self-funded insurance plans.

2. Defendant Galbraith & Green, Inc., held itself out as an expert in such plans and represented itself as qualified to provide consulting and administrative advice to the Salt Lake City School District.

3. Salt Lake City School District retained Galbraith & Green to consult with it regarding its self-funded health plan which it provided to its employees and over a long period of time made regular payments to Galbraith & Green, Inc., for its services.

4. Galbraith & Green, Inc., was obligated to advise the Salt Lake City School District of pertinent changes in the law affecting the District's self-funded plan and undertook to so advise the District.

5. Prior to Wade Welch's termination as an employee of the District, Section 31-10-11 of the Utah Code Annotated became effective and most likely would have applied to Mr. Welch.

6. Galbraith & Green unreasonably failed to advise the District of the effect of Section 31-10-11.

7. Galbraith & Green, as a part of its consulting services, prepared and provided to the District a booklet titled "Your Medical & Life Plan" which it knew would be distributed by the District to the District's employees.

8. The booklet purported to outline the benefits available under the District's self-funded medical and life plan.

9. The section of the booklet titled "Termination of Coverage" was ambiguous by its terms.

10. In particular, sub-paragraph (e) of the section of the booklet on "Termination of Coverage" could have led employees of the District such as Wade Welch to believe that his medical and life coverage continued beyond his termination date.

11. The Salt Lake City School District settled the Civil No. C80-7911 with Wade and Susan Welch for $5,000.00.

12. The settlement was reasonable.

13. The Salt Lake City School District incurred attorneys fees of $2,623.50 in defending itself against the claim of Wade and Susan Welch in Civil No. C80-7911.

14. The attorneys fees incurred were reasonable, appropriate and necessary and were consistent with fees charged for similar services in this area.

CONCLUSIONS OF LAW

1. ERISA did not preempt Section 31-10-11, Utah Code Annotated.

2. By failing to advise the Salt Lake City School District of its obligation to comply with Section 31-10-11, Utah Code Annotated, in a timely fashion and by ambiguously drafting a booklet which it knew would be distributed to employees of the Salt Lake City School District, Galbraith & Green breached its professional consulting responsibility.

3. Galbraith & Green had a duty to both the Salt Lake City School District and to the employees of the Salt Lake City

School District not to breach its professional consulting reponsibility.

4. Because of the breach of Galbraith & Green's professional consulting responsibility, the Salt Lake City School District became liable to Wade and Susan Welch in Civil No. C80-7911.

5. As between the Salt Lake City School District and Galbraith & Green, Galbraith & Green had the primary responsibility to discharge the liability to Wade and Susan Welch.

6. Galbraith & Green is obligated to indemnify the Salt Lake City School District for the reasonable amount of $5,000.00 which the District paid to settle Civil No. C80-7911.

7. Galbraith & Green is further obligated to indemnify the Salt Lake City School District for its reasonable and necessary attorneys fees incurred in defending that civil action in the amount of $2,623.50.

8. The Salt Lake City School District is entitled to interest on the amounts of $5,000.00 and $2,623.50 from the date of its settlement, June 29, 1982, at the rate of 10% per annum until judgment.

DATED this 9th day of Nov., 1984.

BY THE COURT:

District Judge J. Dennis Frederick

ATTEST
H. [illegible] HINCKLEY
Clerk

By _____
Deputy Clerk